

JUL 27 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT  
OF THE  
UNITED STATES

VETERANS OF FOREIGN WARS, POST )  
4264, a non-profit association; )  
YAMPA VALLEY COOPERATIVE ASSO- )  
CIATION, a Colorado corporation; )  
F. M. LIGHT & SONS, INC., a Col- )  
orado corporation; ELOISE MORE, )  
d/b/a DAIRY KING; DONALD BROOK- )  
SHIRE, d/b/a CORNER LIQUOR; )  
EDWARD DETRICH, d/b/a WAFFLE )  
SHACK, on behalf of themselves )  
and as representatives of a )  
class of persons similarly )  
situated, )

Plaintiffs-Appellants, )

vs. )

CITY OF STEAMBOAT SPRINGS, a )  
municipality established under )  
the laws of the State of )  
Colorado, )

Defendant-Appellee. )

No. 77-1784

Appeal from the Supreme Court of Colorado

No. 27587

Appellee's Motion to Dismiss

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## APPELLEE'S MOTION TO DISMISS

### SUBJECT INDEX

	<u>Page</u>
Table of Cases.....	(i)
Motion to Dismiss.....	1
(A) Introduction.....	1
(B) Statement of the Case.....	1
(C) Argument for Motion to Dismiss.....	3

### APPENDIX

Appendix: definitions from Ordinance 480.. 8

### TABLE OF CASES

<u>Amalgamated Food Employees v.</u> <u>Logan Valley Plaza</u> , 391 U.S. 308 (1968)...	6
<u>Art Neon v. City and County</u> <u>of Denver</u> , 488 F.2d 118 (10th Cir.1973)...	4
<u>Broadrich v. Oklahoma</u> , 413 U.S. 601 (1973)	5

(i)

## MOTION TO DISMISS

Pursuant to Rule 16, Rules of the Supreme Court of the United States, the Appellee submits this Motion to Dismiss the appeal sought by the Appellants through their Jurisdictional Statement which has been previously filed with this court.

### (A) Introduction

The Appellee submits this brief Motion to Dismiss to point out to the Court the reasons why the appeal sought by the Appellants herein should be dismissed. Appellee has no basic exceptions to sections(a),(b) or (c) of Appellants' Jurisdictional Statement. Appellee wishes to point out that Ordinance No.565, referred to on page 2 of the Appellants' Jurisdictional Statement and which amended the sign code provisions of Ordinance No.480, was not introduced into evidence at the trial of this case. Ordinance No. 565 is included in pages 17 through 21 of Appendix A to the Appellants' Jurisdictional Statement.

### (B) Statement of the Case

The Appellants' Statement of the Case contained on pages 3 through 6 of their Jurisdictional Statement is essentially accurate. Appellee does wish to make several additions and clarifications to Appellants' Statement of the Case.



Appendix A of Appellants' Jurisdictional Statement is offered as a portion of the general zoning ordinance for the City of Steamboat Springs, Ordinance No.480. The portion of the ordinance included in the Appellants' Appendix A does include the regulations for signs which were considered by the Colorado Supreme Court. However, Appellants' Appendix A fails to include portions of the Ordinance which set forth numerous definitions applicable to the sign regulations. Appellants have only included the definition of the word "sign" as it is presented in the ordinance.

To assist the Court with its interpretation of the sign code under consideration, Appellee has included an Appendix to this Motion to Dismiss which includes the definitions contained in the general zoning ordinance which are applicable to the sign regulation contained in Ordinance No.480, other than the definition for the word "sign". These definitions are part of the record which was presented to the Colorado Supreme Court.

Furthermore, on page 4 of their Jurisdictional Statement, Appellants describe Section 19(E)(2) of Ordinance No.480 as a "blanket prohibition" against the display of all signs at any location which is more than three feet over or into public property. This section, which can be found at page 14 of Appendix A of Appellants' Jurisdictional Statement, only prohibits those signs described as "marquee" or "detached" signs from extending into or over public property more

than three feet. The limited application of this section was recognized by the Colorado Supreme Court in its decision below (see pages 15 and 16 of Appendix C to the Appellants' Jurisdictional Statement).

Appellants' description of the testimony at trial, contained at page 5 of their Jurisdictional Statement is, of course, incomplete. Appellee will only state that, taken as a whole, the transcript of the trial below which was considered by the Colorado Supreme Court supports the conclusions of the trial court and the unanimous decision to affirm by the Colorado Supreme Court.

(C) Argument in Support of Motion to Dismiss

Appellants' principle reason for this Motion to Dismiss is its earnest belief that the decision rendered by the Colorado Supreme Court properly and adequately addresses the issues which Appellants now ask this Court to review. Furthermore, Appellee believes that the concerns raised by Appellants have been adequately addressed in prior decisions of this Court.

It would be fruitless to assert that this case does not present federal questions. Clearly, all issues herein involve First Amendment consideration. The Colorado Supreme Court, which expressly passed on these issues, devotes most of its decision to a discussion

of First Amendment concerns and relies heavily on federal authority to support its view.

However, a federal question must also be substantial to justify the acceptance of an appeal by this Court. While recognizing the serious import of the issues herein, Appellee submits that the involvement of First Amendment concern does not automatically qualify an issue as a substantial federal question. This is especially so when the impact of the ordinance in question is clearly understood in light of its content and in light of previous case law which implicitly supports this type of regulation. Much of this case law is cited in the opinion of the Colorado Supreme Court.

At the outset, Appellants' Jurisdictional Statement strains to enlarge the actual impact of the ordinance. The Colorado Supreme Court correctly recognized this. The definition of the word "sign" of which the Appellants complain has already been before a federal court on at least one prior occasion. Art Neon v. City and County of Denver, 488 F.2d 118 (10th Cir.1973).

The effect of the six exclusions from the definition of the word "sign" and the sixteen exemptions to the permit requirement, including signs required or authorized "by any law", is to extremely minimize the effect of the sign code on protected forms of speech. As the Colorado Supreme Court

noted in its decision, the sign code affects First Amendment rights "only secondarily." (See Jurisdictional Statement, Appendix C - page 13.)

Furthermore, the hypotheticals posed by Appellants on pages 8 and 9 of the Jurisdictional Statement are not supported by the factual record or City administrative practice. Intent on finding fault at any cost, Appellants have urged the Court to dwell upon the "germs of uncertainty" which this Court has recognized must undoubtedly exist in any regulation which attempts to be both specific and manageably brief. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The prior restraints and lack of procedural safeguards of which Appellants complain simply do not exist. The ordinance upheld is replete with sufficiently clear and specific standards and procedures designed to protect the speech of those wishing to erect any signs which do come within the permit requirement. Furthermore, the "pernicious" power which Appellants argue is vested in the Board of Adjustment with respect to its variance authority is misstated. The Board of Adjustment is given discretionary guidance with very specific standards to follow in both Sections 19(A)(2) and 19(D) of Ordinance No. 480.

The Appellants' complaints addressed at Section 19(E)(2) of the ordinance have been directly addressed by the Colorado Supreme Court, and as



its opinion notes, many other courts throughout this country. Appellants' reliance upon Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) at page 16 of the Jurisdictional Statement is also misplaced. The ordinance in question is not a broad or absolute regulation of First Amendment rights and, as this Court recognized in the same decision, municipalities possess the power to control the use of public property. This power has been recognized in many opinions of this Court. 391 U.S. at 320-321.

In conclusion, a sign limitation ordinance passes constitutional muster if the governmental interest is unrelated to suppression of expression, and is substantial in relation to the restrictions imposed, and if the restrictions are no greater than necessary for the protection of the governmental interest. Free speech is not an absolute license at all times under all circumstances. Here, the sign code under question passes constitutional muster. The governmental interests involved are clearly recognizable and have been discussed and upheld both by the Colorado Supreme Court and by this Court in many prior decisions.

Therefore, this appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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## APPENDIX

Further definitions contained in Ordinance No.480 of the City of Steamboat Springs relating particularly to the regulation of signs (all definitions are subsections of Section 2(B) of Ordinance No.480).

- 34. Marquee. A sign attached to and supported by the building and projecting over public property.
- 51. Sign Area. The area of the smallest plane geometric figure which encompasses the facing of a sign, including copy, insignia, background and border. For wall signs consisting of the individual letters attached or painted to the building surface, the sign area shall be derived by adding the smallest plane geometric figures of each of the individual words. In the event that a sign has more than one face, the areas of each face shall be added to determine the total sign area.
- 52. Sign Code. Uniform Sign Code, 1973 edition, or any substitute sign code adopted by the City Council.
- 53. Sign, Detached. Any sign structurally separate from the building housing and the use to which the sign is appurtenant, such sign being supported on itself, or on a standard or legs.

- 54. Sign Height. The height above grade measured from the average grade at the base of the sign to the highest point of the sign trim or detached support structure.
- 55. Sign, Projecting. Any sign supported by a building wall and projecting therefrom on a horizontal plane more than twelve (12) inches.
- 56. Sign, Wall. Any sign painted on, incorporated in, or fixed to the building wall, and any sign consisting of cut out letters or devices affixed to the building wall with no background design on the building wall, provided such sign does not project from the building wall in a horizontal plane more than twelve (12) inches.